ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	
Protection and Competition Act of 1992	)	MM Docket Nos. 92-266 and 93-215
	)	
Rate Regulation	)	
	)	

RESPONSE TO RECONSIDERATION PETITIONS

TIME WARNER CABLE

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Its Attorneys

Dated: February 3, 1995

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SUMMARY

The National Association of Telecommunications Officers and Advisors erroneously argues that Section 623 of the Communications Act does not allow the Commission to create unregulated NPTs. Section 623 provides that the rates for cable programming services "shall be subject to regulation by the Commission." NPTs are "subject to regulation" under the Commission's scheme. The conditions which the Commission has set for the offering of an NPT, along with the reporting requirements for NPT providers, will enable the Commission to ensure that NPT rates do not become unreasonable. Under Section 623 the Commission is free to experiment with different forms of rate supervision for cable programming services. The Commission's regulatory scheme for NPTs complies with that provision.

The City of Tallahassee argues that the Commission erred in allowing NPT treatment to those cable operators who offered discounted packages of *a la carte* services consisting of no more than six channels to their subscribers on the effective date of the Commission's rate regulations. Even if this challenge to the Commission's LOI decisions were proper in the context of this rulemaking, the City of Tallahassee's argument is incorrect. Cable operators who implemented *a la carte* packages prior to September 1, 1993 did not clearly engage in evasive behavior. Time Warner Cable and many other operators who made packages of *a la carte* services available did so in the belief that such offerings were permitted as a legitimate response to rate regulation under the 1992 Cable Act. Not only did the Cable Act and the Commission provide that movement of programming from a regulated tier to *a la carte* status was permissible, but the Commission also indicated that the option of purchasing *a la carte* services as discounted collective packages was a legitimate practice. Therefore, the City of Tallahassee's argument that the migration of a limited number of regulated services to *a la carte* status and the discounting of those services on a collective basis was a clear evasion of the Commission's rules and the 1992 Cable Act is entirely without foundation.

The Commission reversed its original position on discounted packages of *a la carte* services in the Sixth Order on Reconsideration. The Commission's LOI decisions recognized that the Commission's previous guidance on this subject was confusing. The Commission correctly decided that those cable operators who relied in good faith on the Commission's prior pronouncements concerning collective offerings of *a la carte* services should not be penalized. This decision cannot be characterized as a reward for evasive behavior since it was simply an equitable remedy for conduct taken in reliance on prior Commission pronouncements.

Time Warner Cable supports the views of those petitioners who believe that the Commission's prohibition on migrating any services now being offered on a regulated tier to an NPT is an overly inflexible approach. In order to attract a substantial number of viewers to new services, some popular anchor programming is needed. Time Warner Cable suggests that the NPT concept should be amended to permit cable operators to migrate up to six services from existing service tiers to NPTs. As long as cable operators are precluded from changing the fundamental nature of existing regulated service tiers and are required to allow subscribers to purchase the NPT without purchasing the CPST and vice versa, the presence of existing regulated levels of service will continue to ensure that the rates for the NPT are not unreasonable. A ceiling of six migrated services comports with the Commission's findings in its LOI decisions that migration of up to six services would not be adjudged an evasion of the Commission's rate regulation rules. In addition, cable operators who have established an NPT with less than six services pursuant to an LOI decision or otherwise should be permitted to migrate additional services from existing tiers to the NPT up to the six service limit.

Finally, the Commission needs to make clear that any restructuring undertaken in connection with the permitted migration of channels to an NPT should not trigger an

obligation to affirmatively market to existing subscribers either the tier from which the services were moved or the resulting NPT.

The City of St. Joseph and Benton Harbor Township, Michigan err when they argue that the Commission changed its rule regarding the offset of programming cost increases from a per channel adjustment to a tier-based adjustment without the notice and comment procedure required by the Administrative Procedures Act. They also wrongly argue that the per channel rule is in violation of the plain language of Section 623(b)(2)(C) of the Communications Act. The statutory language does not clearly state whether the offset concept is to be applied on a per channel or per tier basis, nor is there anything in the legislative history to lend credence to the interpretation put on this language by petitioners. The Commission's original rule implementing this statutory section was equally unclear. Indeed, the Commission was subsequently requested to clarify the meaning of the rule. In three letters issued in 1994 the Commission responded to these requests for clarification and stated that the rule envisioned a per channel adjustment. All that the Commission did in its Sixth Order on Reconsideration was to codify the clarification it made in these letters. Such a clarification does not contravene the statute, nor does it violate the notice and comment requirements of the Administrative Procedures Act.

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RESPONSE TO RECONSIDERATION PETITIONS

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., by its attorneys, hereby responds to certain issues raised in various pending Petitions for reconsideration of the Commission's new "going forward" rules.[1] Some parties ask the Commission to reconsider its decision to allow cable operators to provide new product tiers ("NPTs") on an unregulated basis if certain conditions are met.[2] Others have asked the Commission to reconsider its decision to allow certain operators who had begun to offer discounted packages of *a la carte* services prior to September 1, 1994 to elect to treat those discounted packages as NPTs.[3] Time Warner supports the general thrust of the Commission's new going forward rules and opposes those parties who claim either that the

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[1]Sixth Order on Reconsideration, Fifth Report and Order and Seventh Notice of Proposed Rulemaking ("Sixth Recon. Order") in MM Docket No. 92-266, 93-215, FCC 94-286 (released November 18, 1994). Time Warner is the plaintiff in several lawsuits challenging the validity of various provisions of the 1992 Cable Act and various Commission regulations promulgated pursuant thereto. Nothing herein should be deemed to concede the legality of any provisions subject to any such pending or future legal challenge.

[2]*See* Petition for Reconsideration filed by the National Association of Telecommunications Officers and Advisers ("NATOA").

[3]*See* Petition for Reconsideration filed by the City of Tallahassee, Florida.

Commission may not allow cable operators to offer NPTs on an unregulated basis or that the new going forward rules reward evasive behavior. Time Warner agrees with those parties who urge that the Commission's going forward rules be modified to provide greater flexibility for operators to tier and package their services in response to an increasingly competitive marketplace.

I. THE 1992 CABLE ACT DOES NOT PREVENT THE COMMISSION FROM ALLOWING CABLE OPERATORS TO CREATE NEW PRODUCT TIERS

NATOA asks the Commission to reverse its decision to not regulate the rates for NPTs. The essence of NATOA's legal argument is that Section 623(c) of the Communications Act requires, for cable systems not subject to effective competition, the Commission to ensure that the rates for cable programming services are not unreasonable. NATOA argues that the conditions set by the Commission for establishing NPTs do not satisfy the Commission's statutory obligation to ensure that the rates charged by operators will be reasonable. This is simply not the case.

Most NPTs are cable programming services as that term is defined in the Communications Act.[4] However, Section 623(a)(2)(B) states that "the rates for cable programming services shall be subject to regulation by the Commission under subsection (c)." This language is permissive, not mandatory. It does not say "shall be regulated." Instead, it states that the rates "shall be subject to regulation". The Commission has stated that NPTs are subject to regulation but that they will not be regulated in a formulaic way.

Section 623(c) tells the Commission to "establish criteria to determine whether rates in individual cases for cable programming services are unreasonable." The Commission has

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[4]Sixth Recon. Order at ¶ 23. Time Warner does not agree, however, that discounted packages of *a la carte* services, even those treated as NPTs by the Commission, are cable programming services.

decided to utilize certain competitive factors as a way of controlling NPT rates. In doing so, the Commission has not abdicated its statutory responsibilities. Quite to the contrary, it has set up a framework to ensure that the rates remain reasonable. Thus, five conditions for offering an NPT must be met:

1. Operators offering NPTs cannot make fundamental changes in BSTs and CPSTs being offered on September 30, 1994.

2. Operators cannot move services to NPTs from BSTs and CPSTs if the channels were being offered on those tiers on September 30, 1994.

3. BSTs and CPSTs must continue to be marketed.

4. Operators cannot charge for NPTs unless a subscriber has requested the NPT by name.

5. Subscription to the BST is the only service offering which can be required as a condition for subscribing to an NPT.

In addition to these requirements, operators will have to file rate cards and subscriber notifications with the FCC when they initiate an NPT and when any NPT rate or service changes are made. This will enable the Commission to monitor compliance with the conditions.

Under Section 623(c), the Commission is free to experiment with different forms of rate supervision for basic and cable programming service rates.[5] The Commission has recognized that it has "a duty under the 1992 Cable Act to ensure that NPTs are not unreasonably priced,"[6] and it has met that duty in a legitimate fashion.

II. THE CONVERSION OF DISCOUNTED PACKAGES OF A LA CARTE SERVICES TO NEW PRODUCT TIERS DOES NOT REWARD EVASIVE BEHAVIOR

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[5]Indeed, Time Warner submits that the statute requires the Commission to utilize a less rigid approach to regulating rates than the current tier neutral benchmark scheme.

[6]*Id.* at ¶ 23.

The City of Tallahassee opposes the Commission's decision to allow cable operators, who offered discounted packages of *a la carte* services consisting of six channels or less to their subscribers as of the effective date of the Commission's rate regulations, to choose to treat these packages as NPTs. It argues that allowing deregulated treatment of these packages as NPTs rewards evasive behavior. Under the guise of challenging the Commission's NPT rules, the City of Tallahassee is attempting to have the Commission reverse its LOI determinations that the restructuring of a limited number of regulated services to *a la carte* status undertaken by certain cable operators in anticipation of regulation was not an evasion of the 1992 Cable Act.

Initially, Time Warner does not believe that this is the appropriate forum to challenge the Commission's disposition of its Letters of Inquiry dealing with *a la carte* packages. As a general matter, the Commission has clearly indicated that the practice of migrating services from a tier subject to regulation to *a la carte* status does not *per se* constitute an evasion.[7] Accordingly, the question of whether an evasion has taken place can only be determined within a specific factual context. It would be improper for the Commission to use this proceeding involving the new going forward rules as a vehicle to reverse, *en masse*, its LOI determinations which determined whether specific conduct was evasive under a completely different set of rules in effect prior to the Commission's Sixth Recon. Order. The Commission must reject Tallahassee's attempt to use this proceeding to collaterally attack the Commission's LOI decisions.

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[7]Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266, 8 FCC Rcd. 5631 (1993) ("Report and Order") at n. 1105. Indeed, in so finding, the Commission considered and expressly rejected substantially the same arguments as those now raised by the City of Tallahassee.

Time Warner also strongly disagrees with any suggestion that cable operators who implemented *a la carte* packages prior to September, 1993 engaged in evasive behavior. Time Warner and many other operators who made available packages of *a la carte* services did so in the belief that such offerings were not only permitted as a legitimate response to regulation under the 1992 Cable Act, but indeed were even encouraged as a means of enhancing subscriber choice.[8] Not only does the 1992 Cable Act expressly preclude the rate regulation of *a la carte* services by either a franchising authority or the FCC, but the legislative history underlying the statute clearly indicates that this deregulated status was to extend not only to services which had traditionally been offered on a per-channel or per-program basis, but also to services which had been previously offered as part of a tier and subsequently unbundled. The statute reflects Congress' belief that "greater unbundling of offerings leads to more subscriber choice and greater competition among program services."[9]

The Commission itself recognized that: (1) unbundling gives consumers "the ability to choose or veto such programming on an individual channel . . . basis;" (2) that the movement of programming from a regulated tier to unregulated status was not prohibited by the 1992 Cable Act; and (3) that the statute itself furnish incentives to unbundle services previously offered only as part of larger service tiers.[10] Absent some extraordinary

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[8]There were many different legitimate responses to the implementation of rate regulation, including decisions to do nothing, to justify rates based on a cost-of-service showing rather than relying on a benchmark showing, to restructure rates on a revenue neutral basis, or to move services to unregulated status by offering them on an *a la carte* basis.

[9]S. Rep. No. 92, 102d Cong., 1st Sess. 77 (1991) ("Senate Report"). *See also* H. Rep. No. 628, 102d Cong., 2d Sess. 90 (1992).

[10]Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266, (continued...)

circumstance, the Commission indicated that the movement of services to *a la carte* status to avoid regulation would not be deemed as an evasion of the statutory provisions or FCC's rate regulation scheme, stating that movement of programming from a regulated tier to unregulated status does not "pose[ ] a significant issue under the regulatory framework of the Act," and adding that "[w]e do not believe that anything in this Act requires us to restrict movement of a channel to premium and deregulated status."[11]

The FCC's Report and Order also addressed the practice of offering customers the option of purchasing per-channel services in discounted collective packages, finding that "such discounts benefit the consumer" and that discouraging such arrangements through regulation "would not serve the purposes of the Cable Act" and "might be counterproductive." Thus, the Commission acknowledged that the statutory exemption from rate regulation for per-channel services also covered discounted collective offerings of such services.[12]

The City of Tallahassee's argument that the migration of a limited number of regulated services to *a la carte* status and the discounting of those services on a collective basis was a clear evasion of the Commission's rules and 1992 Cable Act is therefore entirely without foundation. To the contrary, if the Commission's numerous pronouncements and

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[10](...continued)
8 FCC Rcd. 5631 (1993) ("Report and Order") at ¶¶ 327, 453, n. 1161. This was subsequently reaffirmed by the Commission in both its First Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking in MM Docket No. 92-266, 9 FCC Rcd. 1164 (1993) ("First Recon. Order") at ¶ 35 and n. 127 and in its Second Order on Reconsideration, Fourth Report and Order and Fifth Notice of Proposed Rulemaking in MM Docket No. 92-266, 9 FCC Rcd. 4119 (1994) at ¶ 194.

[11]Report and Order at n. 1105.

[12]*Id.* at ¶¶ 327-29.

legislative history made anything clear, it was that such offerings were permitted, if not encouraged, as a legitimate response to the new regulatory scheme. Indeed, at the very least, the Commission has acknowledged in disposing of its numerous LOIs on the subject that its prior attempts to establish guidelines for determining when the movement of regulated services to unregulated status might be deemed an evasion may have created substantial confusion in distinguishing legal from evasive conduct.[13]

On November 18, 1994, more than a year and a half after adopting its initial Report and Order, the Commission revisited the regulatory status of collective offerings of *a la carte* services in connection with its Sixth Recon. Order. As a result, the Commission reversed its original decision treating discounted packages of *a la carte* services as exempt from rate regulation. In doing so, the Commission expressed the belief that all collective offerings of channels, even where the channels are available for purchase on an individual basis, meet the statutory definition of cable programming services and are thus subject to federal regulatory oversight.[14] The fact that the Commission has now reversed its own previous interpretation of the statute in and of itself indicates that the actions which the City of Tallahassee characterizes as "clearly evasive" were just the opposite.

In recognition of the fact that many cable operators had begun to offer collective packages of *a la carte* services in reliance upon the Commission's previous interpretation of the statute, the Commission's LOI decisions and its Sixth Recon. Order provided several options for those cable operators which found themselves in a contrary position with this new interpretation of the statute. Cable operators could elect to continue to offer their *a la carte*

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[13]*See, e.g.*, Warner Cable Communications (LOI-93-14), DA 94-1276 (released November 18, 1994) at ¶¶ 15-18.

[14]Sixth Recon. Order at ¶ 46.

services on an individual basis and cease the practice of offering discounted packages of these services. Cable operators were also given the option of moving the services offered in the collective package back to the regulated tier(s) of service from where they came. Finally, operators who migrated six or fewer services from existing tiers were given the option of continuing to offer these services on an unregulated collective basis as an NPT. This last option places those operators who relied on the Commission's prior pronouncements concerning collective offerings of *a la carte* services in substantially the same position they were in prior to the Commission's decision to reverse its interpretation of the statute and avoids penalizing operators who in good faith relied on the Commission's previous interpretation. To characterize this last option as a reward for evasive behavior is simply a gross mischaracterization of what is in fact a reasonable and equitable remedy to avoid gross injustice based on detrimental reliance.

III. GREATER FLEXIBILITY IN CREATING NPTS IS NEEDED TO PROVIDE SUFFICIENT INCENTIVES FOR CABLE OPERATORS TO ADD NEW PROGRAMMING AND TO ENABLE OPERATORS TO RESPOND TO MARKETPLACE DEMANDS

Several parties have requested the Commission to reconsider its rules governing NPTs to allow for greater flexibility in moving services from existing regulated tiers to an NPT in order to provide anchor programming that will attract customers to the NPT.[15] Time Warner agrees with those parties who believe that a prohibition on migrating any existing services to an NPT is unnecessary to ensure that NPT rates are not unreasonable. The migration prohibition represents an overly inflexible approach which diminishes both the incentive to provide NPTs and the likelihood that NPTs would be successful in attracting substantial numbers of viewers, the critical factor for new programmers.

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[15]*See, e.g.*, Petition of Continental Cablevision; Petition of Cox Communications, Inc.

The Commission has long recognized that the flexibility of cable operators to package and market their services has increased the diversity of programming available to the public while at the same time allowing operators to respond in a rapidly changing and dynamic marketplace.[16] While Time Warner acknowledges that the Commission has been charged with the duty of ensuring that basic rates are reasonable and that cable programming service tier rates are not unreasonable, an overly inflexible approach to rate regulation which diminishes incentives to add new services and to package those services in a way that maximizes their attractiveness to subscribers will stifle the very innovation which fueled the rapid growth of the cable industry over the past decade, both in terms of the increased number of programming services that have been developed and the increased number of people having access to those services.

Time Warner believes that the NPT concept represents an appropriate way to prevent unreasonable rates while still providing cable operators with incentives to grow and expand their service offerings. Because NPTs are structured in a fashion that both prohibits cable operators from changing the fundamental nature of existing regulated tiers and generally prohibits any tier buy-through requirements (other than the requirement to purchase an entry level basic service tier), there is no real likelihood that cable operators would be able to use NPTs as an evasion. However, the NPT rules should be made more flexible by allowing cable operators to migrate as many as six services from existing service tiers to anchor the new services added to an NPT in order to create an NPT package that subscribers would find attractive as an enhancement to their existing level of services. Cable industry experience in marketing new services has demonstrated that the acceptance and ultimate success of most

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[16]Community Cable TV, Inc., 95 FCC 2d 1204, 1216-17 (1983).

new services is in large part attributable to the ability of cable operators to market such services together with existing services that already have achieved a brand familiarity and an established level of subscriber acceptance. As long as cable operators are precluded from changing the fundamental nature of existing service tiers in migrating up to six services from existing tiers to the NPT and are required to allow subscribers to purchase the NPT without purchasing the CPST and *vice versa*, the presence of existing regulated levels of service will continue to ensure that the rates for the NPT are not unreasonable.

Time Warner suggests six as the number of permissible migrated services because the Commission has accorded NPT treatment to discounted packages of collective offerings of up to six channels in its LOI decisions. Time Warner believes that establishing a maximum number of six channels which could be moved from existing tiers to create a foundation audience for the NPT would not be unreasonable. In its LOI decisions, the Commission has found that migrating up to six services does not undermine the efficiency of its regulatory scheme. Furthermore, allowing operators to migrate up to six services from existing tiers to anchor the NPT would encourage experimentation and innovation in the provision of existing and new services to subscribers, and allow cable operators to respond to increasingly competitive market conditions within the framework of ensuring that rates are not unreasonable.[17]

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[17]To the extent that the Commission decides to allow cable operators to migrate as many as six services from existing tiers to anchor an NPT, it should make clear that cable operators who have established an NPT with less than six services pursuant to an LOI decision would be permitted to migrate additional services from existing tiers to the NPT up to the limit established by the Commission. In no event should an operator be required to reduce the number of migrated services on the NPT to a level below that which was expressly permitted in a relevant LOI decision.

The Commission also needs to make clear that any restructuring undertaken in connection with the permitted migration of channels to an NPT would not require the cable operator to affirmatively market either the tier from which the services were moved or the resulting NPT to existing subscribers. The Commission has already recognized in a similar context that restructuring undertaken to migrate existing services from one or more existing tiers to an NPT does not constitute a fundamental change in the services being provided.[18] The same reasoning applies regardless of whether migration occurred prior to or after September 1, 1994. Indeed, for the very same reasons which it did so in those cases, the Commission should also make clear that state and local negative option laws would be unenforceable to the extent that they required affirmative marketing of such permitted NPTs to existing subscribers.

The Commission's proposal to allow existing services to be offered as part of an NPT as long as they continue also to be available as part of the existing service tier (*i.e.*, cloning) will not provide the same incentives to innovate and experiment that would be possible by allowing limited migration. It is highly doubtful that cloned programming would successfully attract the foundation audience necessary to ensure the success of the NPT since an existing CPST subscriber would not need to purchase an NPT to obtain the anchor programming on that tier. In such a situation, cloning provides a subscriber with no added incentive to sample the new programming which might be contained in an NPT and may in fact provide a disincentive by creating the perception that the subscriber is being asked to pay twice for the same product. Moreover, cloning would be a waste of channel capacity which could better be used to provide new and innovative services.

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[18]*See* Warner Cable Communications (LOI-93-14), DA 95-60 (released January 20, 1995); Comcast Cablevision (LOI-93-2), DA 95-61 (released January 20, 1995).

IV. THE COMMISSION DID NOT ILLEGALLY CHANGE ITS REVENUE OFFSET RULE

The City of St. Joseph and Benton Charter Township ("West Michigan Communities") ask the Commission to change its rule regarding the offset of programming cost increases from a per-channel adjustment to a tier-based adjustment. West Michigan Communities assert that the Commission improperly changed the rule from a tier-based rule to a per-channel rule without notice or opportunity to comment. In addition, they argue that the per-channel rule is in violation of the intent behind and plain language of Section 623(b)(2)(C) of the Communications Act.

First, Section 623(b)(2)(C) does not mean what West Michigan Communities would have the Commission believe. That section states only that the Commission "shall take into account . . . revenues (if any), received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic service tier." This language does not state whether the offset concept is to be applied on a per-channel or per tier basis, nor is there anything in the legislative history to lend credence to the interpretation put on this language by West Michigan Communities. The Conference Report quoted by West Michigan Communities only states that this provision was intended to be used "to keep the rates for basic cable service low."[19] It did not set out a blueprint for how the Commission was to accomplish this goal.

As originally adopted, Section 76.922(d)(3)(x) of the Commission's rules stated that "[a]djustments to permitted charges on account of increases in costs of programming shall be further adjusted to reflect any revenues received by the operator from the programmer."

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[19]H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. 63 (September 14, 1992).

This was hardly an unequivocal requirement that any adjustments to the maximum permitted rates must be tier-based nor, no matter how hard West Michigan Communities tries, do the instructions for Line B1a on FCC Form 1210 clarify the issue.

Indeed, it was not long after the promulgation of this rule that a number of parties inquired of the Cable Services Bureau whether the rule was tier-based or channel-based, a sure sign that the rule was not a model of clarity. In the three letters cited by West Michigan Communities in their petition,[20] cable programmers had sought clarification as to just exactly what the Commission meant by this rule which West Michigan Communities finds so clearly written. In each of these cases the Commission clarified that Section 76.922(d)(3)(x) envisioned a per-channel adjustment. No notice or comment period is necessary for the Commission to clarify what it means in an unclear rule. All that the Commission did in the Sixth Recon. Order was to codify the clarification it made in these

[20]*See* Letter from Cable Services Bureau Chief to QVC Networks, Inc., dated May 6, 1994, Letter from Cable Services Bureau Chief to The Home Shopping Networks, dated May 6, 1994, and Letter from Cable Services Bureau Chief to MTV Networks, dated August 2, 1994.

three letters. Thus, the per-channel adjustment reading of the Commission's rule was not adopted in a fashion which violated the notice and comment provision of the Administrative Procedures Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Reconsideration Petitions was served on the 3rd day of February, 1995, via first-class mail, postage prepaid upon the following parties:

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